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No. 88-192

In the Supreme Court of the United States

OCTOBER TERM, 1989

McKESSON CORPORATION, PETITIONER

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA, RESPONDENTS

**On Writ of Certiorari to the
Supreme Court of Florida**

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief will address the first question set forth in the Court's July 3, 1989 order:

When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

RULE 28.1 STATEMENT

Amici are certified plaintiff classes in *American Trucking Associations, Inc.* v. *Smith*, No. 88-325, consisting of all motor carriers whose vehicles were "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," including the following named plaintiffs:

American Trucking Associations, Inc. (ATA), an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Leon Cawood, a sole proprietor doing business as Leon Cawood Trucking.

Commercial Carriers, Inc., a wholly owned subsidiary of Ryder Commercial Transport, Inc., which in turn is a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Railhandling, Inc.; B & C, Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Diamond Transportation System, Inc., an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Fox Motor Transport, Ltd.; Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Joe Fortenberry, a sole proprietor doing business as Fernwood Transportation.

Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of JTL Holding Company.

Rollins Leasing Corporation, a wholly owned subsidiary of R.L.C. Corporation. Rollins' only affiliate or subsidiary (other than wholly owned subsidiaries) is Rollins-Matlack Administrative Services, Inc.

Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

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INTEREST OF THE AMICI CURIAE

American Trucking Associations, Inc., *et al.* ("ATA"), are the plaintiffs (petitioners before this Court) in the companion case to this one—*American Trucking Associations, Inc.* v. *Smith*, No. 88-325 ("*ATA*"). The questions posed by the Court in its July 3 order are not dispositive of *ATA* because relief in that case was denied solely on the federal law ground that *ATA* v. *Scheiner*, 483 U.S. 266 (1987), is not retroactive. Unlike in this case, there is no suggestion in *ATA* that, if this Court held *Scheiner* retroactive, the state law refund remedy invoked by ATA would be unavailable. Accordingly, there is no occasion for the Court to address in *ATA* the existence of a federal right to such relief. See 88-325 Reply Br. 9.

The Court's resolution of the latter issue may affect subsequent proceedings in *ATA*, however, because the Arkansas courts might on remand hold that the state law remedy is not available. Amici's right to a refund would then depend upon the existence of such a remedy as a matter of federal law. For that reason, amici have an interest in the resolution of the questions raised by the Court. More generally, ATA and its members frequently —and often successfully—challenge state taxes on Commerce Clause grounds. See, *e.g.*, *ATA* v. *Scheiner*, *supra;* *ATA* v. *Goldstein*, 312 Md. 583, 541 A.2d 955 (1988); *Commonwealth of Kentucky, Transp. Cabinet* v. *ATA*, 746 S.W.2d 65 (Ky. 1988); *ATA* v. *Quinn*, 437 A.2d 623 (Me. 1981). Amici accordingly have a general interest in the availability of refunds when such challenges are successful.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has asked the parties to address whether federal law requires a state to provide some form of retrospective relief when taxes have been exacted in clear violation of the Commerce Clause. There is no categorical answer to that question. It goes too far to say that federal law *always* requires such refunds; there clearly are cases where there has been no actual or at least no material injury to interests protected by the Commerce Clause, and in which prospective relief is entirely adequate (see the discussion of *Tyler Pipe Indus., Inc.* v. *Washington Dep't of Revenue*, 483 U.S. 232 (1987), at page 27, *infra*). The opposite extreme, that there is *never* a federal right to restitution of unconstitutional taxes, is equally unsound, for the reasons we set forth in the argument that follows. In our view, the proper rule is to treat restitutionary relief as the norm, while recognizing that in certain limited circumstances the taxing authority will be able to show that disgorgement of a lesser amount,

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

or prospective relief alone, is adequate to serve the relevant federal interests.

Florida's arguments do not rely primarily upon any universal rejection of retrospective relief. Instead, they focus on singular attributes of this case that were found by the Florida Supreme Court to warrant a departure from what would appear otherwise to be a general state law refund right. Though we disagree with Florida's contention, any special circumstances of this case should not be allowed to obscure the Court's analysis of the general question whether there is ordinarily a federal right to refunds of taxes exacted in violation of the Commerce Clause.

The Court should therefore approach the question it posed by considering in the first instance cases in which no equitable considerations could possibly bar refunds. Suppose that instead of taxing alcoholic beverages and favoring those made from citrus fruits, Florida taxed the sale of such fruits themselves, imposing a higher rate on citrus imported from other states than on that grown in Florida. Given the dominance of Florida citrus in the Florida market, no one could assert that this was simply a matter of an improper "exemption." Conceptually, however, the same fundamental issue of federal rights and remedies would be presented. We submit that in such a case federal law would require the State to surrender the excess tax unlawfully exacted from non-Florida growers.

The Court has traditionally structured this kind of inquiry by looking at five elements: whether the court in which suit was brought had jurisdiction; whether the plaintiff has alleged sufficient injury to confer standing; whether a cause of action exists to secure some form of redress for the wrong alleged; whether the remedy sought by the plaintiff is available to redress that wrong; and whether the defendant can show some affirmative defense to the grant of relief in the particular case. See page 12, *infra*.

Here, there is no question of jurisdiction or standing. Nor can there be any serious doubt that the cause of action requirement is satisfied. Florida permits taxpayers to challenge the legality of taxes on Commerce Clause grounds, as demonstrated by the fact that its courts adjudicated McKesson's claim on the merits and conferred prospective relief. And even if there were no state cause of action, a federal cause of action exists directly under the Constitution, as is implicit from the jurisprudence permitting injured parties to sue for vindication of rights under the dormant Commerce Clause.

The more substantial question is that of remedy: whether, in addition to providing a right to obtain prospective relief to terminate Commerce Clause violations, federal law confers a right to retrospective relief, restitutionary in nature, in appropriate circumstances. The Court has repeatedly affirmed the existence of such a right in the context of unlawful taxation (see cases cited at page 8, *infra*), stressing the inequity of any other result. It is argued in response that such equitable concerns are not persuasive because Commerce Clause rights are structural rather than personal. Not only has this distinction recently been rejected by the Court (*Davis* v. *Michigan Dep't of the Treasury*, 109 S.Ct. 1500 (1989)), but it overlooks the fact that it is the structural needs of the Commerce Clause that make the retrospective remedy essential.

The Commerce Clause is a response to a special problem inherent in the federal structure of our political system—the natural tendency of state lawmakers to serve the parochial interests of their constituents at the expense of the national free trade market. The mere prospect of forward-looking relief is often, as in this case, entirely inadequate to bring about discontinuance of discriminatory legislation, because it makes the violation of the Commerce Clause cost-free by permitting the State and its local interests to retain the benefits of the unconstitutional law. The need for a retrospective remedy is thus great.

The costs of a disgorgement remedy are not sufficient to offset the deterrence and fairness benefits of requiring retrospective relief. First, such relief will not be required in that class of cases in which, under the *Chevron* test, a weighing of the governmental reliance interests, the relevant constitutional policies, and the equities dictates that a rule of law be confined to prospective application. Second, the financial impact is ordinarily limited to disgorgement of moneys that the government should have known were being unlawfully collected. And finally, there are many methods available to ameliorate the impact of refunds on the public fisc, including, most notably, the ability to raise through new (but nondiscriminatory) taxation the revenues needed to finance a refund.

The conclusion that federal law requires retrospective relief—including, where necessary to cure the constitutional injury, tax refunds—does not end the inquiry, for there might in a particular case be affirmative defenses to payment of any refund or to payment of the full amount claimed by the taxpayer. For example, sovereign immunity might be asserted in some cases involving state taxes. We believe that sovereign immunity is not an available defense to the federal right to retrospective monetary relief in this context. But the Court need not consider the point in this case, for it is clear that Florida has waived sovereign immunity for suits seeking refunds of the taxes at issue here, and the denial of refunds rested on wholly different grounds.

Florida's primary defense here is that, even if there is a general federal right to a refund, it should not apply to cases like this one in which the Commerce Clause violation consists of improper exemption of a relatively small group of potential taxpayers. But even if McKesson would have been required to pay nearly the same amount of tax in the absence of the unlawful exemption of in-state producers, that consideration appears inadequate to out-

weigh the federal interest in deterring the kind of discriminatory legislation at issue here.

Finally, it should be recognized that Florida's "windfall" argument is not one of general application. In many cases, of which *ATA* is an example, the Commerce Clause violation clearly causes the out-of-state taxpayer to pay far more than its fair share of the total tax burden. Accordingly, even were the Court disposed to deny relief amounting to a "windfall," the federal retrospective remedy must at a minimum operate to restore the taxpayer to a position no worse than it would have been in under a proper form of the tax.

ARGUMENT

A STATE MUST DISGORGE AND REFUND TO AN AGGRIEVED TAXPAYER THE DISCRIMINATORY COMPONENT OF A TAX EXACTED IN VIOLATION OF THE COMMERCE CLAUSE

Before proceeding with the body of the argument, we tender some preliminary observations about the way in which the Court framed the additional questions to be considered on reargument. The Court's first question places the issue in context by summarizing the key facts of this case—that the tax was paid under protest and that the tax violated clearly established Commerce Clause principles. It is important to recognize, however, that those precise facts are not necessary to establish a taxpayer's right to retrospective relief.

For example, some states do not require that taxes be paid under protest in order to preserve the taxpayer's right to a refund. In those states, there would be no reason to condition the federal right to retrospective relief upon satisfaction of such a requirement. Of course, where state law does impose reasonable procedural rules for preserving a tax refund claim, such as lodging a protest or complying with a statute of limitations, those requirements may be incorporated into federal law as valid preconditions to the availability of any federal remedy. See

Ward v. *Board of County Commissioners*, 253 U.S. 17, 25 (1920) (recognizing that a refund claim could be barred by "valid" local law such as a statute of limitations).

Similarly, while the extent of justifiable reliance on prior law is certainly relevant to the federal refund right, that right should not be limited to cases in which a state tax violates clearly established Commerce Clause principles. The Court's *Chevron* test contemplates retrospective relief even when a decision resolves prior legal uncertainty or embodies a new and unexpected legal rule, provided that the relevant constitutional policies and equitable considerations call for such an outcome (see 88-325 Pet. Br. 14-40). The considerations identified in *Chevron* parallel those that shape the federal right to disgorgement of unconstitutional taxes. Accordingly, if Commerce Clause principles warrant retroactive application under *Chevron*, a violation of those principles should normally give rise to the same retrospective federal remedies as a violation of "clearly established" principles.

The second question posed by the Court deals with the constitutionality of retroactive taxation of the favored class as a means of rectifying an unlawful discrimination. In theory, any obligation to grant retrospective relief could be satisfied in this manner, provided that such retroactive taxation is both practical and constitutional.[2] In some cases, however, this alternate remedy simply will not be available. The facts of the companion case to this one—*American Trucking Associations, Inc.* v. *Smith*, No. 88-325 ("*ATA*")—illustrate the potential practical problems.[3] Where the alternative of raising the taxes of the

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[2] Even where this approach would be administratively praticable, we have serious doubts as to its constitutionality.

[3] Retroactive taxation of the favored class of Arkansas-based trucks is not practical because records simply do not exist from which their Arkansas highway mileage could be calculated. Most of these vehicles satisfied the HUE tax by paying the flat $175

benefited class is not available, any federal obligation to afford retrospective relief would have to be discharged by providing refunds to taxpayers victimized by the unconstitutional discrimination.

A. This Court Has Recognized In A Variety Of Contexts That Retrospective Relief Is Essential To Remedy A Violation Of The Constitution

There is nothing novel or surprising in the principle that unconstitutional taxes must ordinarily be refunded to those from whom they were wrongfully exacted. To the contrary, a long line of this Court's decisions—each unanimous—requires disgorgement of taxes exacted in violation of the Constitution. In *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), for example, the Court held that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Id.* at 369. And in *Montana Nat'l Bank* v. *Yellowstone County*, 276 U.S. 499 (1928), the Court made the point in unmistakable terms: "[A taxpayer] cannot be deprived of its legal right to recover the amount of the tax[es] unlawfully exacted of it by [a] later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury." 276 U.S. at 504-505; see also *Jackson County* v. *United States*, 308 U.S. 343, 350-351 (1939); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *District of Columbia* v. *Thompson*, 281 U.S. 25, 31-33 (1930); *Ward*, 253 U.S. at 24; *Atchison T. & S.F.R.R.* v. *O'Connor*, 223 U.S. 280, 285 (1912). The lower federal courts have recognized the continued vitality of this principle. *United States* v. *State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981);

amount; moreover, because many of them were operated only within the State, they did not have to maintain mileage records for purposes of the fuel use tax.

Gallagher v. *Evans*, 536 F.2d 899, 900-901 (10th Cir. 1976).[4]

No sound reason exists for the Court to repudiate this long line of precedent. These cases have sound jurisprudential moorings that justify—indeed, mandate—continued adherence to the principle that federal law requires that a taxpayer be afforded retrospective relief. There may be exceptions to this general principle, as where the three-part *Chevron* test allows prospective-only application of the rule, or perhaps even where retrospective relief would produce an unjustified windfall. But the possibility of exceptions does not undermine the legitimacy of the general principle.

The federal right to retrospective relief is not limited to unconstitutional taxation. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980), for example, the Court held that a city is not entitled to qualified immunity from damages liability in an action under 42 U.S.C. § 1983. The Court reached that result in large part because it was consonant with general remedial principles. Thus, the Court observed that "[a] damages remedy against the offending party is a vital component" of any remedial scheme (445 U.S. at 651). The Court added that "[i]t

[4] Contrary to the assertion (Br. 8) of amici NCSL, *et al.*, *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929) (per curiam), does not undermine the holdings of *Ward*, *Carpenter*, and their progeny. *Ohio Oil* was a case in federal court that involved state law as well as federal constitutional challenges to a state tax. The Court granted a preliminary injunction barring enforcement of the tax during the pendency of the action, noting "the entire absence under local law of any remedy enforceable by the plaintiff if the tax be paid and afterwards held invalid by the final decree." 279 U.S. at 815. Because any federal refund right would not extend to the pendent state law claims, *Ohio Oil* is not inconsistent with the existence of such a right. In any event, there is no basis for inferring from the Court's opaque per curiam disposition of this request for preliminary relief a considered analysis and rejection of the principle set forth in *Ward*; to the contrary, only 10 months later the Court reaffirmed that principle in *Carpenter*.

hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. * * * Elemental notions of fairness dictate that one who causes a loss should bear that loss." *Id.* at 654; see also *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 396 (1971); *id.* at 407-409 (Harlan, J., concurring).

The Court concluded in *Owen* that these general remedial considerations apply with particular force when government acts in violation of the Constitution. "[T]he importance of assuring [the] efficacy [of a scheme for vindicating constitutional rights] is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." 445 U.S. at 651. In this situation especially, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights * * * have been violated." *Id.* at 655; see also 88-325 Pet. Br. 12-13.

Similar principles underlie the Court's decision in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987). The Court there held that even if government discontinues action held to be a taking, thereby providing the property owner with the equivalent of prospective relief, the Constitution nevertheless requires provision of a retrospective remedy. "[N]o subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.[5]

[5] Florida (Br. 9-13) and the NCSL (Br. 17-18, 24-25) place heavy reliance on cases indicating that, insofar as *prospective* relief is concerned, states are entitled to remedy equal protection violations by eliminating the unlawful discrimination. These cases are entirely beside the point, for nothing in them rules out the potential need for retrospective relief. Indeed, if the question were squarely presented we doubt that this Court would deny a restitutionary remedy to, for example, victims of a racially discriminatory

Although the Court has not had occasion in recent years to invoke the rule set forth in *Ward* and *Carpenter*, it has indicated that the general remedial principles discussed above are fully applicable in the context of taxes violative of the Commerce Clause. For example, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), Hawaii argued that the Court did not have to reach the merits of the Commerce Clause challenge to a state tax because the exemptions at issue were severable from the rest of the statute. The Court rejected the contention, noting that "the challenged exemptions have now expired and 'severance' would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but locally produced products were not." 468 U.S. at 267-268 n.7. In other words, the elimination of discrimination for the future did not provide all of the relief to which the plaintiffs were entitled; some form of retrospective relief also was necessary. As we now discuss, this conclusion is well founded in the general legal principles governing the availability of remedies under the Constitution.

B. Federal Law Supplies A Disgorgement Remedy To Taxpayers Forced To Pay A Tax That Violates The Commerce Clause

Many states have statutes authorizing refunds of illegally collected taxes. See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Law. 103, 126-127 (1987). But even if a state has such a statute, state law may not authorize retrospective relief in all circumstances. For example, the Florida refund statute generally requires refunds of taxes found to be unlawful, including those held violative of the federal Constitution. See Fla. Stat. § 215.26 (1988); *State ex rel. Victor Chemical Works* v. *Gay*, 74 So.2d 560, 564 (Fla. 1954); see also *Ostendorf*

tax or of a charge only to women for state services provided to both men and women.

v. *Turner*, 426 So.2d 539, 545 (Fla. 1982); *Department of Revenue* v. *AMREP Corp.*, 358 So.2d 1343 (Fla. 1978); *Department of Revenue* v. *Page*, 541 So.2d 1270 (Fla. Ct. App. 1989). Nevertheless, the Florida Supreme Court held that a refund was unavailable in the present case on the ground that it would amount to "a windfall, since the cost of the tax has likely been passed on to [McKesson's] customers." J.A. 430.

When a state tax is found to violate the Commerce Clause and that ruling is held retroactive as a matter of federal law, but retrospective relief is not available under state law, the question arises whether the Constitution itself entitles the taxpayer to retrospective relief in the form of disgorgement of the illegally exacted taxes. We submit that the Constitution does ordinarily so require, although there may be circumstances in which such relief could properly be withheld, and the amount of refund might be less than the full amount of the tax. See page 27, *infra*.

A party's right to invoke the judicial process to obtain a particular type of relief depends upon the satisfaction of several different prerequisites. *Davis* v. *Passman*, 442 U.S. 228, 234-249 (1979); *Bivens*, 403 U.S. at 399-407. First, the court in which the action is instituted must have subject matter jurisdiction over the claim. Second, the party invoking the court's jurisdiction must have standing to maintain the action. Third, the plaintiff must have a cause of action—he must be "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis*, 442 U.S. at 239-240 n.18. Fourth, the remedy sought by the plaintiff must be a permissible form of relief. And, fifth, the plaintiff must be entitled to that remedy on the facts of the particular case.

McKesson's claim easily satisfies the first two requirements. There is no dispute either that the Florida court in which McKesson instituted the action had jurisdiction to entertain McKesson's claims or that the controversy

between McKesson and the State was and is sufficiently concrete and adverse to support standing.

Moreover, in considering the issue in this case the Court should put to one side the question whether a state may assert an affirmative defense of sovereign immunity to defeat the federal obligation to disgorge unconstitutionally exacted taxes. The existence of such a defense would, of course, be a question of federal law (see *Martinez* v. *California*, 444 U.S. 277, 284 (1980)), and we are doubtful that federal law ever would recognize such a defense in view of the strong policies underlying the disgorgement remedy (see pages 15-22, *infra*). See *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908); *Private Truck Council of Am., Inc.* v. *New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986) ("policy considerations inherent in the doctrine [of sovereign immunity] require that sovereign immunity not bar a common law claim for refunds when the State has been given fair notice that the taxpayer protested payment of the tax").

But where a state has not asserted its sovereign immunity to bar tax refunds, the issue does not even arise. And that is precisely the situation here. As noted, Florida has generally agreed to refund illegally exacted taxes, and it is clear from the decision below that the grounds relied on would be equally available in the case of a county or city tax. Since Florida has not invoked its sovereign immunity to bar judicial resolution of tax refund claims, there is no reason that it should be accorded a sovereign immunity defense as a matter of federal law.

Against this background, we turn to the elements of a taxpayer's claim that are at issue in this case.

1. *The Cause of Action Requirement Is Satisfied in This Case*

This Court has observed that "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant

may b entitled to receive. The concept of a 'cause of action' is employed specifically to determine who may judicially enforce * * * rights or obligations." *Davis*, 442 U.S. at 239; see also *Bivens*, 403 U.S. at 397; *id.* at 400-402 (Harlan, J., concurring). "A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies." *Davis*, 442 U.S. at 239-240 n.18.

It is plain that Florida law supplies the requisite cause of action here. Florida has specifically authorized its taxpayers to enforce in its courts all substantive rights to be free from improper taxation, whether conferred by state or federal law. See pages 11-12, *supra*. The decision in this case, where the state courts adjudicated McKesson's Commerce Clause claim on the merits and awarded prospective relief, establishes beyond any doubt the existence of the state cause of action.[6]

If there were a state that did not provide a cause of action to enforce rights under the Commerce Clause, there would nevertheless be a federal cause of action implied directly under the Commerce Clause. This Court has repeatedly concluded that an implied cause of action is available with respect to constitutional protections that are judicially enforceable. *Davis*, 442 U.S. at 242-243; *Bivens*, 403 U.S. at 397; *id.* at 400-401 (Harlan, J., concurring); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). The rationale of those decisions applies in this context as well. Absent an implied cause of action, a taxpayer could not obtain prospective injunctive relief against an ongoing violation of the Commerce Clause—a result that Florida, Arkansas, and their amici do not and could not defend. Whether a taxpayer seeks prospective or retrospective

[6] It is similarly clear in *ATA* that Arkansas law provides an analogous cause of action. See 88-325 Reply Br. 9.

relief for a Commerce Clause violation, the cause of action is precisely the same.

2. *The Constitution Requires a Disgorgement Remedy in Appropriate Cases*

Once a cause of action exists, the next essential questions are whether the Constitution ever requires the restitution of unconstitutionally exacted taxes, and, if so, whether it does so in the particular case. To the extent the Constitution does mandate such a remedy, a court adjudicating a Commerce Clause challenge in the context of a state law cause of action would be obliged to make the remedy available with respect to taxes collected in violation of the Commerce Clause. See *Carpenter*, 280 U.S. at 369 ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment"); cf. *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 109 S.Ct. 633, 639 (1989) (the Constitution bars a state from limiting a taxpayer to the remedy of seeking to raise the taxes of others; the state itself must provide a remedy for the unconstitutional discrimination).[7] Similarly, a remedy required

[7] This is how the commentators have read *Carpenter* and related cases. See, *e.g.*, Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 294 n.97, 297 n.111 (1984) (citing *Ward*: "[S]ome federal rights require provision of an adequate state remedy. * * * [S]tate courts are required by the Constitution to provide adequate remedies for constitutional guaranties * * * [, including] appropriate restitutionary relief for breach of federally imposed duties"); Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 939, 972-973 n.394 (1986) (citing *Ward*: "The Court * * * sometimes * * * has said that states must provide a remedy but has left to the states the choice of what remedy to provide. * * * [T]he federal system chose to rely on state remedies to recover illegally exacted taxes. A state rule that no recovery was possible, however, transgressed federal purposes and was not an acceptable rule"); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 955 (1988) (citing *Ward*: "the Supreme Court has compelled state courts to provide constitutional remedies even when state law conferred no

by the Constitution would be available to a taxpayer who invokes the federal cause of action described above.

The powerful commonsense support for a disgorgement remedy can best be illustrated by comparing the present case with one in which a taxpayer has refused to pay a tax on the ground that it violates the Commerce Clause. Cf. *Ashland Oil, Inc.* v. *Rose*, No. 88-421 (juris. statement filed Sept. 9, 1988). Assume that the state court adjudicating a collection action held that the tax in question was unconstitutional but nevertheless ruled that it had to be paid. We think it clear that, unless the state could invoke some federally recognized ground such as nonretroactivity under *Chevron*, federal law would protect the taxpayer from being forced to pay a tax concededly unconstitutional under the Commerce Clause. A taxpayer who paid the very same tax under protest should not be disadvantaged vis-a-vis one who has resisted paying the tax at all. To the extent that the latter cannot be compelled to pay the unconstitutional tax, so the former should be entitled to restitution of the illegally exacted tax.

Arkansas (Br. 23-28), Florida (Br. 13-14), and the NCSL (Br. 21-23) argue that there is no right to retrospective relief in this context, because the Commerce Clause does not confer private rights but is instead a structural provision of the Constitution. Even if this characterization of the Commerce Clause were correct,

authority for them to do so"); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 228 (1981) ("[T]he Court has held in several cases that the Constitution * * * requires the state court to give relief. In *Ward* * * *, for instance, the Court ruled that an Oklahoma court was constitutionally obligated to give the remedy of damages"); Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100, 151 (1985) ("the primary significance of [*Ward*] may be its support of the proposition that state courts have a constitutional obligation to provide adequate remedies for federal rights").

which it is not,[8] it would provide no basis for concluding that retrospective relief is unavailable. It is undisputed that aggrieved individuals may obtain declaratory and injunctive relief against discrimination that violates the dormant Commerce Clause. This is a complete answer to the contention that affirmative relief may never be awarded at the instance of those victimized by such violations. Prospective relief is available because courts have concluded that such a remedy is appropriate to ensure compliance with the Commerce Clause. *Bell* v. *Hood*, 327 U.S. at 684. If, as we show below, the same

[8] This Court recently rejected a similar argument that "structural" constitutional principles do not give rise to individual rights. In *Davis* v. *Michigan Dep't of the Treasury*, 109 S.Ct. 1500 (1989), a case involving intergovernmental tax immunity, the State argued that an individual taxpayer could not claim the protection of the immunity doctrine in seeking a tax refund because its purpose was "to protect governments and not private entities or individuals" (*id.* at 1507). The Court disagreed, holding that an individual could maintain such a claim: "It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary" (*ibid.* (citations omitted)). The same conclusion plainly applies here as well.

In fact, the contrary argument is semantic, not substantive. The rights conferred by the Commerce Clause, like those conferred by many other provisions of the Constitution, are both structural and personal. For example, the Establishment Clause is even more purely "structural" than the Commerce Clause, yet it cannot be doubted that individuals injured by violations of that provision may sue to secure redress of their injuries. Similarly, the protection of the Free Speech Clause typically is viewed as conferring a personal right, but the right also can be described as a structural one, securing robust political debate in order to promote the political well-being of the Nation. In like fashion, the right of individuals under the dormant Commerce Clause to participate in a national market free of discriminatory state regulation similarly can be characterized as a structural right or as the personal right to be free of discriminatory state regulation not authorized by Congress.

is true for retrospective monetary relief, such a remedy also would be warranted.[9]

The question whether a remedy should be recognized in a particular circumstance "must be resolved by weighing [its] costs and benefits." *United States* v. *Leon*, 468 U.S. 897, 907 (1984). The benefits of a retrospective remedy in the context of taxes found to violate the Commerce Clause far outweigh the costs associated with such a remedy.

We already have discussed the relevant Commerce Clause policies and the need for deterrence in considerable detail (see 88-325 Pet. Br. 28-33; 88-325 Reply Br. 16-17) and reiterate only the most salient points here. The overriding purpose of the Commerce Clause is to open up the channels of national commerce and prevent the states from favoring in-state over out-of-state businesses. See, *e.g.*, *New Energy Co.* v. *Limbach*, 108 S.Ct. 1803, 1807 (1988); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980); *Nippert* v. *Richmond*, 327 U.S. 416, 425-426, 434-435 (1946); *Guy* v. *Baltimore*, 100 U.S. 434, 443 (1880).

[9] It is well settled that this Court will recognize a retrospective remedy for violations of a constitutional right where that remedy is warranted to ensure effective deterrence of violations of the right. Thus, the exclusionary rule applicable to evidence obtained in violation of the Fourth Amendment "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Similarly, the Court has shaped the remedy provided by the First Amendment overbreadth doctrine to ensure that the adoption of unconstitutional laws is not "cost free." *Massachusetts* v. *Oakes*, 109 S.Ct. 2633, 2639-2640 (1989); see generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1149 (1969).

The debate over the exclusionary rule has focused principally on whether the rule is appropriate in view of its costs and benefits, not on the Court's power to require that such a remedy be made available in order to deter violations of the Fourth Amendment. To the extent the latter issue is subject to dispute, it is because of the nontraditional nature of the suppression remedy. "A court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among *traditional* judicial remedies" (*Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring) (emphasis added)); the remedy of disgorgement surely falls within that category.

This Court has recognized on numerous occasions that the political structure established by the Constitution carries an inherent incentive for the states to engage in the very economic protectionism that the Commerce Clause prohibits. As it said in invalidating a discriminatory tax on itinerant salesmen:

> Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

Nippert, 327 U.S. at 434-435. Accordingly, "to the extent that the burden [of economic regulation] falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 46 n.2 (1940). See, *e.g.*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-768 n.2 (1945); *South Carolina State Highway Dep't* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938).

Commentators also have pointed out the hydraulic pressures for economic legislation that discriminates in favor of local interests. For example, Professor Tribe has observed that

> state and local lawmakers are especially susceptible to pressures which may lead them to make decisions harmful to the commercial interests of those who are not constituents of their political subdivisions. That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents.

L. Tribe, *American Constitutional Law* § 6-5, at 409 (2d ed. 1988) (emphasis in original). See also R. Posner, *Economic Analysis of Law* § 26.3, at 602 (3d ed. 1986) ("[e]ach state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states").

The threat of prospective invalidation of a particular tax statute under the Commerce Clause is not alone sufficient to counter the states' powerful structural incentives to discriminate against out-of-state interests. A state considering whether to adopt a statute of doubtful constitutionality, or even a plainly unconstitutional one, would retain every reason to do so: it would be able to keep all of the taxes it managed to exact before the statute was challenged and invalidated by a court; and local interests would enjoy an unimpaired advantage during that period.

The facts of both this case and *ATA* demonstrate that the states do in fact act in precisely that manner. See 88-325 Pet. Br. 30-33. Indeed, one Florida legislator specifically referred to the absence of a refund remedy in urging his colleagues to replace one discriminatory tax on alcoholic beverages with a new one that was equally offensive to the Commerce Clause. 88-192 Pet. Br. 15-16.

In order to curb this tendency to enact statutes that discriminate against interstate commerce, it is essential that the states' economic incentive be eliminated. Retrospective disgorgement relief "serve[s] as a deterrent against future constitutional deprivations" and provides an "incentive" for governmental decisionmakers "to err on the side of" complying with the Constitution. *Owen*, 445 U.S. at 651-652; see also Tatarowicz, 41 Tax Law. at 141-142; Wolcher, 69 Calif. L. Rev. at 310. Precisely this point was made by a majority of the Court in concluding that a First Amendment overbreadth challenge to a criminal statute may be maintained even though the statute has been repealed. *Massachusetts* v. *Oakes*, 109

S.Ct. at 2639-2640 (opinion of Scalia, J.) (emphasis added):

> [T]he argument is made that it is senseless to apply this doctrine when the protection of other conduct can no longer be achieved, which is the case when the statute has already been amended to eliminate any unconstitutional "chilling" of First Amendment rights. Even as a policy argument, this analysis fails. The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact. *If the promulgation of overbroad laws affecting speech was cost free, as the plurality's new doctrine would make it*—that is, if *no* conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal—*then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.* When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be "chilled" as a consequence of the rule the plurality would adopt.

The same considerations refute the argument that prospective remedies suffice to meet the needs of the Commerce Clause.

In addition, the fundamental unfairness of preventing a taxpayer from recovering funds unlawfully taken from him by the state weighs in favor of recognizing a disgorgement remedy. See *Ward*, 253 U.S. at 24 ("[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law"); see also *District of Columbia* v. *Thompson*, 281 U.S. at 31 (citing *Ward* for

the principle that government must make restitution of funds held "in its treasury * * * which it has no right in equity, good conscience, or common honesty to retain").[10]

The sole factor on the cost side of the ledger is the financial impact on governmental entities of the obligation to disgorge unconstitutionally exacted taxes. It is true that the disgorgement remedy may sometimes result in repayment obligations that appear large when viewed in absolute terms, but several factors reduce considerably the weight that should be accorded to this interest. First, *Chevron* directs that these same considerations be weighed in determining whether to accord a ruling retrospective effect. Consequently, the issue of refund relief will not even arise unless the financial burden argument already has been found wanting. It accordingly should not be sufficiently weighty to preclude recognition of a disgorgement remedy.

Second, merely requiring the return or repayment of funds paid to the state may be less burdensome than obliging a state to pay damages, which could subject it to monetary liability well beyond its revenues and would require use of funds that the state rightfully acquired in the first place. As Professor Wolcher has explained (69 Calif. L. Rev. at 309-310):

> [A] state has little legitimate reason to object to a constitutionally implied remedy in state court in cases where the plaintiffs seek the return of property or the refund of money that the state has unconstitutionally taken from them. * * * A state court should give appropriate relief in such a case because the fiscal integrity of the state is at best minimally affected by the remedy. * * * The state is simply being asked to give value for equivalent value taken and retained. Hence the net value of the fisc remains unimpaired.
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> * * * * *
>
> [The state] is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place. The action in substance presents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues.

See also *Ward*, 253 U.S. at 24.

Third, there is considerably less reason to be solicitous of a state's financial concerns where the question involves the state's obligation to return money it had no right to exact in the first place. The state chose a course of action that might result in the invalidation of its tax, and protection of the relevant constitutional interests requires that it bear the risks associated with that decision. See 88-325 Pet. Br. 33-35. Given that the controlling rule of law is entitled to retroactive application under *Chevron*, the state can claim no reliance interest that would allow it to keep the unconstitutionally exacted tax.

Fourth, the state's ability to finance any refund through the adoption of new, nondiscriminatory taxes ameliorates considerably any possible financial burden. The state simply would serve as a conduit for rectifying the past discrimination. In addition, the financial impact of a refund would not have to be borne in a single year but could be spread out over a period of years by such means as paying the refunds in installments or financing them through long-term bonds. See 88-325 Pet. Br. 36-38.

Weighing the modest cost against the undeniable—and essential—deterrence provided by an appropriate disgorgement remedy in the Commerce Clause context, it is clear that the Court should reaffirm the availability of the remedy recognized in *Carpenter* and similar cases.

The parallels between the tax refund context and the situation in which there is a governmental taking of

[10] The availability of the restitutionary remedy also would encourage taxpayers to pay their taxes and sue for a refund rather than forcing the government to institute collection actions, thereby promoting orderly adjudication of tax disputes.

private property requiring payment of just compensation support the conclusion that a disgorgement remedy is appropriate here. See *Ward*, 253 U.S. at 24 (characterizing the county's refusal to provide refunds as a "tak[ing]" of the taxpayers' property). In both circumstances the individual is deprived of ownership or use of property under the compulsion of governmental authority, but, upon judicial examination, the government is held to have had no right to act as it did.

In the takings situation, the government must either discontinue its conduct for the future or pay just compensation for the full value of the property; but whichever course it chooses, *First English Church* holds that it must return to the property owner the value of the property taken prior to the judicial determination. The analysis here is informed by the Framers' conclusion—embodied in the Takings Clause—that government is not entitled simply to restore the property to its owner for future use. Instead, it must make restitution (in the form of just compensation) for the value taken prior to restoration of the property. In the taxation context, government should have a comparable obligation not only to stop levying the unconstitutional tax, but to restore the taxpayer to the position it would have enjoyed but for the unlawful exaction of the tax.

3. *The Scope of the Restitutionary Remedy*

We have shown in the preceding discussion that the federal remedy for taxation that violates the Commerce Clause includes, in appropriate cases, disgorgement by the taxing entity of sums that were discriminatorily exacted. Nothing in the opinion of the Florida Supreme Court and little in the State's brief really disputes these conclusions. The heart of the State's defense is quite different: because McKesson allegedly did not pay significantly more tax than it would have if the exempt Florida products had been fully taxed, and because McKesson allegedly "passed on" the tax to its customers in the form

of higher prices, it is argued that a refund is not required because it would be an unjust windfall. This is not an argument about the existence of a general right to retrospective relief; rather, it addresses whether the general right is applicable to the particular circumstances of this case. It also raises questions about the extent of the disgorgement that should be required in various situations.

As noted at the outset, it is essential to appreciate, in thinking about this problem, that McKesson's situation is not prototypical of all constitutional tax refund claims. For example, a tax such as Florida's liquor tax or a general sales tax varies directly with the quantity of product sold. Whatever might be said about the likelihood of passing on such taxes, there is no comparable basis for assuming that other types of taxes, such as the corporate franchise tax at issue in *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984), or the flat highway taxes struck down by *Scheiner*, would be passed on to the taxpayer's customers.[11]

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[11] Traditionally, the pass-on doctrine has been limited to the sales tax context, in which the legal incidence of a challenged tax falls not on the seller of goods but on the purchaser. In such circumstances, the plaintiff seller, which merely collected and remitted the tax, is sometimes confined to prospective relief. See, *e.g.*, *State ex rel. Szabo Food Services, Inc.* v. *Dickinson*, 286 So.2d 529, 532 (Fla. 1973).

In any event, the assertion of the Florida Supreme Court in this case that McKesson had passed on its taxes is rife with problems. To begin with, it represents a factual conclusion arrived at without notice to McKesson that the matter was in issue and without opportunity for a factual hearing. Beyond that, the conclusion is improbable. A tax, like any other increased cost of business, will be "passed on" in the form of increased prices only to the extent that economic factors, such as highly inelastic demand, permit. Any attempt to pass on tax costs by raising the price of a product will adversely affect sales and profitability, and would be especially impractical where the taxpayer is competing with producers whose goods are taxed at a reduced rate. At least in the case of flat highway taxes, efforts by states to resist refunds on a "pass-on" theory have been unsuccessful. *ATA* v. *Conway*, No. 88-156 (Vt.

Moreover, the extent to which it could be said that a refund of an unconstitutional tax would confer a windfall varies substantially with the circumstances of particular cases. Thus, a state might impose a tax on activity that is entirely immune from taxation, such as a direct tax on importation of goods from another state or a tax on income derived from federal government securities.[12] In such a case, a full refund of the illegitimate tax would entail no element of windfall for the taxpayer.

Florida's windfall argument would also have no place in many cases in which a tax is imposed on a properly taxable transaction but in a discriminatory manner. In *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977), for example, New York sought to encourage use of New York stock exchanges by imposing a tax on the transfer of securities that was twice as high for a sale occurring on an out-of-state exchange as it was for a sale occurring in New York. Because the vast majority of stock sales with any New York nexus occurred on New York exchanges, the class of taxed out-of-state transactions disfavored by the scheme was small. In such a case, it is clear that the out-of-state transaction has been subjected to an additional, discriminatory tax, rather than the in-state transaction having received an improper "exemption." Florida's argument that the discrimination had no material effect on the victim's tax liability would be wholly inapplicable in this type of circumstance.

The fact that there are bound to be many cases of this sort, combined with the general desirability of enforcing

Aug. 25, 1989), slip op. 12-13 (copy lodged with Clerk of this Court); *ATA* v. *Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct., Sept. 8, 1988) (copy lodged with Clerk of this Court); *Ryder Truck Rental, Inc.* v. *Revenue Cabinet*, No. K 88-R-38 (Ky. Bd. Tax App., June 16, 1989) (Order No. K-12811).

[12] Vermont did something comparable when it imposed a tax on out-of-state trucks for the privilege of entering the State. See *ATA* v. *Conway*, 508 A.2d 405 (Vt. 1986), cert. denied, 483 U.S. 1019-1020 (1987).

Commerce Clause requirements effectively, suggests that the normal rule should be that the government must restore to the victim of a discriminatory tax the amount necessary to undo the discrimination. But this rule is not absolute. Rather, the taxing authority should be permitted to show that particular circumstances exist that make it unnecessary or inequitable, as a matter of federal law, to grant any or all of the relief requested. Cf. *Lemon* v. *Kurtzman*, 411 U.S. 192, 203-206 (1973).

Such a defense would be at its strongest in cases in which the objection to a tax is purely theoretical, and the taxpayer can demonstrate no actual discrimination. The Washington tax at issue in *Tyler Pipe* is an example. That tax, which was imposed on the manufacture or wholesaling of goods in the State but exempted those doing both from paying both taxes, was held to violate the Commerce Clause because it lacked internal consistency—*i.e.*, its structure raised a theoretical possibility that, if other states adopted the same tax, those who manufactured in one state and sold in the other would be subjected to multiple taxation. The Court indicated (483 U.S. at 249) that the defect could be cured by granting a credit for taxes imposed in another state on a multistate transaction. In fact, however, the taxpayers apparently incurred little or no actual double taxation and would have paid virtually the same tax to Washington even if such a credit mechanism had been in place. See *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286, 1292 (Wash.), appeal dism'd & cert. denied, 108 S.Ct. 2030 (1988). In such a case, where there has been no actual discrimination and no increased tax burden on interstate business, refund relief would not appear to be required either in fairness to the taxpayer or in order to remedy actual injury to Commerce Clause interests.

Other cases of unconstitutional taxation in violation of the Commerce Clause array themselves at intermediate points along the spectrum. This is true of both *McKesson*

and *ATA*, which differ from the extremes discussed above and also from one another. Both cases involve significant unlawful discrimination between in-state and out-of-state products or businesses; but *ATA* also involves a far greater adverse impact on the actual tax burden of the out-of-state businesses.

In *McKesson*, the decision of the Florida Supreme Court refusing to refund the difference between what in-state and out-of-state producers were taxed plainly fails to undo the effects of the discrimination. Moreover, the undeniable tendency of such decisions is to embolden state legislators to continue in the future to satisfy the parochial demands of their constituents and ignore the dictates of the Commerce Clause. Florida does not really deny these untoward consequences but instead stresses that, because of the relatively small volume of in-state products given favored treatment, the discrimination in tax rates had relatively little impact on the overall tax burden of out-of-state producers. Therefore, Florida argues, a refund of the full amount of the discrimination would relieve out-of-state producers such as McKesson of a substantial portion of their fair tax burden and for that reason could be seen to constitute an inappropriate windfall.

On balance, for the reasons set forth more fully above in discussing the availability of a restitutionary remedy, we submit that the need to provide meaningful deterrence of Commerce Clause violations is the more powerful of these two competing concerns. Therefore, full retroactive rectification of the discrimination is proper in *McKesson*. But even if the Court were to accept Florida's argument that the right to a refund should not extend to taxes that would have been paid anyway under a non-discriminatory regime, it would not follow that there is never any federal right to a refund—only that such a right is not available to the extent it would confer a significant windfall. In other words, even if there is no right to retrospective eradication of the discrimina-

tion, the state should, at a minimum, restore to the taxpayer sums exacted in excess of the taxpayer's fair share of the total tax burden.[13]

The Arkansas HUE tax illustrates this point. A survey prepared in the *ATA* case indicated that the average Arkansas-registered heavy truck paid about 1¢ per mile of operations (88-325 J.A. 68, 139, 144), whereas the majority of non-Arkansas-registered trucks, which operated fewer than 3,500 miles annually in the State, were required to pay 5¢ per mile. When the HUE tax was finally repealed in the wake of Justice Blackmun's escrow order, it was replaced with a 2.5¢/mile tax that varied only with miles of operation and contained no discriminatory cap benefiting more extensive users. Ark. Code Ann. § 27-35-205(f). These figures demonstrate that non-Arkansas truckers were subjected to substantial discrimination because many of them paid five times as much per mile as equally heavy Arkansas-registered trucks. But even more important, the Arkansas tax forced out-of-state truckers to shoulder not only the tax load fairly attributable to their own operations but a large part of the burden related to the operations of in-state truckers.

Accordingly, in the discriminatory taxation context, the minimum remedy required to respond to an unconstitutionally discriminatory tax is disgorgement of so much of the unlawful tax as is necessary to ensure that the taxpayer has not carried more than its fair share of the total tax burden. Such amounts cannot be characterized as a windfall, as taxes that the victimized taxpayer should in fairness have paid in any event, or as being inequitable in any other respect.

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[13] The fair share of any taxpayer victimized by unconstitutional discrimination would be determined by computing how much the taxpayer would have paid if the state had raised the same amount of money through a nondiscriminatory tax.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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